S.B.Civil Misc. Appeal No.245/2003

Prem Kumar vs. Firm Delux Rest House and another.

Date : 1.5.2006

HON'BLE MR. PRAKASH TATIA, J.

Mr. MS Purohit, for the appellant.

Mr. MS Panwar, for the respondent.

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At the request of learned counsel for the parties, the appeal is heard finally.

It appears from the order dated 7.7.2001 passed by the first appellate court that the first appellate court in regular first appeal against the judgment and decree of the trial court dated 9.2.1998, found that two additional issues should have been framed by the trial court. The first appellate court framed two additional issues which are with respect to the fact whether in case, the suit of the plaintiff is decree for eviction of the defendant who will suffer more hardship ? and another issue was whether by passing the decree for eviction of tenant from the part of the premises, the need of the plaintiff will be satisfied ? After framing these two issues, the first appellate court straight way set aside the judgment and decree dated 9.2.1998 without considering the merit and instead of remitting the matter for obtaining decision on two additional issues, remanded the matter to the trial court.

This Court on 1.4.2003, after taking note of the facts mentioned above, directed the trial court to proceed with recording of evidence and record the finding on newly framed issues and this Court further directed the trial court not to decide the other issues afresh in pursuance to the first appellate court's remand order. This Court also directed that the finding on additional issues may be sent to this Court (High Court).

The record of the trial court received with the order dated 25.8.2003 deciding the two additional issues.

Learned counsel for the appellant submits that the first appellate court committed serious error of law in setting aside the judgment and decree of the trial court and in remanding the matter without examining the merits of the issues which have been decided by the trial court. The first appellate court could have at the most remitted the matter for deciding the newly framed issues but could not have remanded the matter as the newly framed issues are independent and separate issues and finding on these issues cannot affect the finding on any issue decided by the trial court in its judgment dated 9.2.1998.

Learned counsel for the respondents tried to support the judgment and decree of the first appellate court.

I have considered the submissions of learned counsel for the parties and perused the facts of this case.

It is clear from the order of the first appellate court

dated 7.7.2001 that the first appellate court without application of mind and without there being any reason for setting aside the entire judgment and decree of trial court set aside the same and remanded the matter to the trial court for deciding afresh. The issues framed by the first appellate court are independent and separate issues and decision thereon has nothing to do with the merits of the other issues. In view of the above reasons, the matter could have been remitted to the trial court and could not have been remanded.

In view of the above discussion, the appeal of the appellant deserves to be allowed, hence, allowed and the order of the first appellate court dated 7.7.2001 is modified. The order setting aside the judgment and decree of trial court is set aside. The order dated 7.7.2001 of the first appellate court be treated to be order of remit. The trial court has already decided the issues, therefore, the findings may be considered by the first appellate court. The first appellate court shall decide the appeal on merits.

The record be sent forthwith to the first appellate court. Both the parties are directed to remain present before the trial court on 22.5.2006. The first appellate court is requested to decide the appeal expeditiously as the matter is old one.

(PRAKASH TATIA), J.

S.Phophaliya